Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-621 OF 1997
SITI NORMA YAAKOB, ABU MANSOR AND HAIDAR JJCA
18 AUGUST 1998

Civil Procedure *— Particulars — Further and better particulars — Whether particulars were null and void as they were not filed within the prescribed time — Whether court had jurisdiction to allow application to extend time to supply particulars after affirming order to file particulars within certain time — Whether court correctly exercised discretion*

The appellant ('the plaintiff') filed an action against the respondent ('the defendant'). Pursuant to the plaintiff's summons in chambers, the registrar ordered the defendant to file and serve on the plaintiff further and better particulars ('the particulars') of the defendant's amended counterclaim on or before 18 July 1997 failing which certain paragraphs of the amended counterclaim be struck out. The defendant appealed to the judge in chambers. The appeal first came for hearing before the judicial commissioner on 8 July 1997 but was adjourned to 14 August 1997 where the judicial commissioner affirmed the order of the registrar in respect of the particulars and the time prescribed therein. On 15 September 1997, the defendant served the particulars on the plaintiff. The plaintiff contended that the particulars were null and void as they were not filed within the prescribed time as ordered by the registrar and confirmed by the judicial commissioner. The plaintiff filed a summons in chambers ('encl 69') to strike out the particulars and the defendant filed a summons in chambers ('encl 73') for an extension of time to file the particulars. The judicial commissioner dismissed encl 69 and allowed encl 73. The plaintiff appealed. The issues before the court were: (i) whether the judicial commissioner had jurisdiction to allow the defendant's application to extend the time to supply the particulars bearing in mind that he had affirmed the order of the registrar on 14 August 1997; and (ii) if he had jurisdiction, whether he had correctly exercised his discretion.

Held, allowing the appeal:

(1) Under O 3 r 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry of the period. The primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances. In the present case, the judicial commissioner erred in exercising his discretion as he did not consider whether the failure to obey the order was intentional or contumelious. Ventilation of the grievances as found by the judicial commissioner could hardly be an acceptable ground for

him to exercise his discretion in favour of the defendant (see pp 307H–I and 310E-F). A

(2) Having regard to the facts before him, the judicial commissioner erred in stating that compliance with the registrar's order would have rendered the subsequent appeal nugatory. An appeal does not automatically operate as a stay of the proceedings in which the appeal is brought and this is clear from O 56 r 1(4) of the RHC. Further, in order that the appeal is not rendered nugatory, it is for the defendant to apply for an order of stay pending appeal (see p 305C–D). B

(3) On the issue of whether the plaintiff had waived any right to file encl 69 and was estopped by his own conduct in not applying to strike out the appeal after 18 July 1997, it should be noted that the appeal was not confined to that part of the order by the registrar on particulars only but also against the striking off of part of the amended defence and the amended counterclaim. Further, at the time when the appeal first came for hearing before the judicial commissioner on 8 July 1997, the time imposed by the registrar had not lapsed yet. In that event, it would not be right or possible for the plaintiff to apply to strike out the appeal. At that point of time, the appeal was properly before the judicial commissioner. Since 14 August 1997 had already been fixed for his decision, it was beyond the plaintiff's control to file an application to strike out the appeal. Clearly therefore, the judicial commissioner was wrong and misdirected himself on this issue (see pp 305G-I and 306A–B). C D E

(4) There cannot be a waiver of the order of the court. On the estoppel issue, it should be noted that estoppel in the context of litigation arises only when a party to an action has at least two alternative and mutually exclusive courses open to him. If he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may be precluded from later changing course. In the present case, the plaintiff took the initiative by encl 69 to strike out the particulars with the consequential result that the relevant paragraphs of the amended counterclaim be struck out. In the circumstances, the judicial commissioner was wrong to rely on the issue of waiver or estoppel in granting the defendant's application (see p 306G–H); *Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan* [1982] 2 MLJ 13 and *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 followed. F G H

Obiter:

It would be wrong for the defendant to determine for herself that the order was a nullity and she need not comply with it. In any event, a party cannot ignore or refuse to comply with an order of court on the ground of nullity (see p 309F, I); *TO Thomas v Asia Fishing Industry* I

Pte Ltd [1977] 1 MLJ 151 and *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 followed.

[Bahasa Malaysia summary

Perayu ('plaintif') memfailkan suatu tindakan terhadap penentang ('defendan'). Menurut saman dalam kamar plaintif, pendaftar memerintahkan defendan supaya memfail dan menyampaikan butir lanjut dan jelas ('butir tersebut') mengenai tuntutan balas terpinda defendan kepada plaintif pada atau sebelum 18 Julai 1997 yang mana kegagalan berbuat demikian akan menyebabkan perenggan-perenggan tertentu tuntutan balas terpinda dibatalkan. Defendan telah merayu kepada hakim dalam kamar. Rayuan telah didengar buat kali pertama di hadapan pesuruhjaya kehakiman pada 8 Julai 1997 tetapi telah ditangguhkan kepada 14 Ogos 1997 di mana pesuruhjaya kehakiman mengesahkan perintah pendaftar berkenaan dengan butir tersebut dan jangkamasa yang ditetapkan dalamnya. Pada 15 September 1997, defendan telah menyampaikan butir tersebut kepada plaintif. Plaintif menghujahkan bahawa butir tersebut adalah batal dan tak sah kerana ia tidak difailkan dalam tempoh yang ditetapkan seperti yang diperintahkan oleh pendaftar dan disahkan oleh pesuruhjaya kehakiman. Plaintif memfailkan suatu saman dalam kamar ('lampiran 69') untuk membatalkan butir tersebut dan defendan memfailkan suatu saman dalam kamar ('lampiran 73') untuk perlanjutan masa bagi memfailkan butir tersebut. Pesuruhjaya kehakiman menolak lampiran 69 dan membenarkan lampiran 73. Plaintif merayu. Isu-isu di hadapan mahkamah adalah: (i) sama ada pesuruhjaya kehakiman mempunyai bidang kuasa untuk membenarkan permohonan defendan bagi melanjutkan masa untuk membekalkan butir dengan mengingati bahawa beliau telah mengesahkan perintah pendaftar pada 14 Ogos 1997; dan (ii) andainya beliau mempunyai bidang kuasa, sama ada beliau telah melaksanakan budi bicaranya dengan betul.

Diputuskan, membenarkan rayuan:

(1) Di bawah A 3 k 5(1) dan (2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah mempunyai bidang kuasa untuk melanjutkan masa sekalipun permohonan dibuat selepas luputnya jangkamasa. Pertimbangan utama dalam melaksanakan budi bicara untuk melanjutkan masa ialah sama ada pihak tersebut boleh menunjukkan bahawa tiada hasrat untuk mengabaikan atau melanggar perintah tersebut dan bahawa kegagalan untuk mematuhi adalah disebabkan keadaan-keadaan luar. Dalam kes ini, pesuruhjaya kehakiman terkhilaf dalam melaksanakan budi bicara beliau kerana beliau tidak mempertimbangkan sama ada kegagalan untuk mematuhi perintah tersebut adalah disengajakan atau 'contumelious'. Penyiaran kilanan seperti yang didapati oleh pesuruhjaya kehakiman tidak mungkin boleh diterima sebagai

alasan untuk melaksanakan budi bicaranya memihak kepada defendan (lihat ms 307H–I dan 310E-F). A

(2) Dengan mengambil kira fakta-fakta di hadapannya, pesuruhjaya kehakiman terkhilaf dalam menyatakan bahawa pematuhan perintah pendaftar akan menyebabkan rayuan berikutnya menjadi tidak berguna. Rayuan tidak beroperasi secara automatik sebagai penggantungan prosiding di mana rayuan dibawa dan ini adalah nyata daripada A 56 k 1(4) KMT. Seterusnya, supaya rayuan tidak dijadikan tidak berguna, defendan hendaklah memohon untuk satu perintah penggantungan sementara menunggu rayuan (lihat ms 305C–D). B C

(3) Mengenai isu sama ada plaintif telah mengenepikan apa-apa hak untuk memfailkan lampiran 69 dan diestop oleh kelakuan sendiri dalam tidak membuat permohonan untuk membatalkan rayuan selepas 18 Julai 1997, haruslah diperhatikan bahawa rayuan tidak dihadkan kepada bahagian perintah itu oleh pendaftar atas butir-butir sahaja tetapi juga terhadap membatalkan bahagian pembelaan yang terpinda dan tuntutan balas terpinda. Selanjutnya, pada masa apabila rayuan mula-mula didengar di hadapan pesuruhjaya kehakiman pada 8 Julai 1997, masa yang dikenakan oleh pendaftar belum lagi luput. Jika itu berlaku, ia tidak betul atau mungkin untuk plaintif memohon untuk membatalkan rayuan. Pada masa itu, rayuan telah dibuat dengan betul di hadapan pesuruhjaya kehakiman. Oleh kerana 14 Ogos 1997 telah pun ditetapkan untuk keputusan, adalah di luar kawalan plaintif untuk memfailkan permohonan bagi membatalkan rayuan. Maka jelaslah pesuruhjaya kehakiman terkhilaf dan telah salah arah dirinya atas isu ini (lihat ms 305G-I dan 306A–B). D E F

(4) Adalah tidak mungkin untuk mengenepikan suatu perintah mahkamah. Atas isu estopel, haruslah diperhatikan bahawa estopel dalam konteks litigasi berbangkit hanya apabila suatu pihak kepada tindakan mempunyai sekurang-kurangnya dua jalan alternatif dan saling eksklusif terbuka kepadanya. Sekiranya ia memilih untuk mengikuti salah satu daripadanya dan dengan itu menyebabkan penentangnya mempercayai bahawa ia telah meninggalkan jalan yang satu lagi, ia boleh dihalang daripada menukar haluan kemudiannya. Dalam kes ini, plaintif telah mengambil inisiatif menerusi lampiran 69 untuk membatalkan butir tersebut dengan keputusan bahawa perenggan-perenggan relevan dalam tuntutan balas terpinda dibatalkan. Dalam keadaan-keadaan ini, pesuruhjaya kehakiman adalah salah dalam bergantung pada isu penepian atau estopel dalam membenarkan permohonan defendan (lihat ms 306G–H); *Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan* [1982] 2 MLJ 13 dan *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 diikut. G H I

Obiter:

Adalah salah untuk defendan menentukan untuk diri sendiri bahawa perintah tersebut merupakan suatu pembatalan dan ia tidak perlu mematuhinya. Bagaimanapun, suatu pihak tidak boleh mengabaikan atau enggan mematuhi perintah mahkamah atas alasan pembatalan (lihat ms 309F, I); *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 dan *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 diikut.]

Notes

For cases on further and better particulars, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3221–3224.

Cases referred to

Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (refd)

Hadkinson v Hadkinson [1952] 2 All ER 567 (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 (refd)

Jokai Tea Holdings Ltd, Re [1993] 1 All ER 630

Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (follD)

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100 (follD)

Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan [1982] 2 MLJ 13 (follD)

Public Bank Bhd v Nikseng Development Sdn Bhd [1997] 3 MLJ 101 (refd)

Samuels v Linzi Dresses Ltd [1981] 1 QB 115 (refd)

TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 (follD)

Legislation referred to

Rules of the High Court 1980 O 3 rr 5(1), (2), O 56 r 1(4)

Appeal from: Civil Suit No S2–23–04 of 1997 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (*Syarikat M Segaram*) for the appellant.

Saraswathy Devi (*Devi Sodhi* and *Mahadevi Nadchatiram* with her) (*Mahadevi Nadchatiram & Partners*) for the respondent.

Haidar JCA (delivering judgment of the court): The appellant ('the plaintiff') appealed against the orders given on 17 October 1997 by the learned judicial commissioner ('JC') (as he then was) in respect of summons-in-chambers dated 20 September 1997 ('encl 69') and summons-in-chambers dated 8 October 1997 ('encl 73') (see p 19 of the appeal record). Both summonses-in-chambers relate to the suit filed by the appellant against the respondent ('the defendant'). The suit is a defamation action and it arose out of a dispute in respect of the vast estate left behind by the respondent's father. In that ensuing dispute, allegations have been made by the respondent against the appellant which the latter considers to be defamatory of him.

Both parties are advocates and solicitors of the High Court, Malaya. They are related. The appellant is the brother-in-law of the respondent, that is, his wife is the sister of the respondent.

Before considering encls 69 and 73, it would be appropriate to set out the background facts leading to the filing of the two summonses-in-chambers.

For ease of reference, the appellant is referred to as the plaintiff and the respondent as the defendant.

Background

Pursuant to the plaintiff's summons-in-chambers dated 29 April 1997, the deputy registrar, on 18 June 1997 made an order ordering, inter alia, the defendant to file and serve on the plaintiff further and better particulars ('the particulars') of the defendant's amended counterclaim dated 19 April 1997, on or before 18 July 1997, failing which, paras (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (20) and (21) of the amended counterclaim be struck out (see pp 137–141 of the appeal record). The defendant was also ordered to pay the costs of the application.

On 21 June 1997, the defendant filed an appeal to the judge in chambers against the whole decision of the deputy registrar given on 18 June 1997 ('encl 39') (see pp 142–147 of the appeal record).

It is not disputed that the defendant did not obtain a stay of the order of the deputy registrar.

On 7 July 1997, the appeal came for hearing before the learned JC but was adjourned to 8 July 1997.

On 8 July 1997, the learned JC ordered:

(a) the parties to put in written submissions; and

(b) fixed the date of decision on 14 August 1997.

On 14 August 1997, the learned JC gave his decision orally. His written judgment was delivered on 17 December 1997 (pp 21–26 of the appeal record). The learned JC made the following orders:

A (i) affirmed the order of the deputy registrar dated 18 June 1997 in respect of the particulars and the time prescribed therein (para 3 of the order);

(ii) allowed the defendant's appeal in respect of the other orders made by the deputy registrar (para 1 relating to the striking out of paras (9), (10), (12), (15) and (16) with the exception of para (11) of the amended statement of defence dated 19 April 1997 and para 2 relating to the striking out of paras (22), (23), (24), (25) and (26) of the amended counterclaim dated 19 April 1997) (see the order at pp 135–136 of the appeal record).

C There was no order in respect of costs of the appeal.

There has been no appeal against the order of the learned JC by either party.

The plaintiff's solicitors vide letter dated 14 August 1997, sent to the defendant's solicitors a copy of the draft order dated 14 August 1997 for D approval, the receipt whereof was duly acknowledged by the defendant's solicitors on the said letter itself (see p 295 of the appeal record). No evidence was shown by the defendant that she did not agree with the draft order. As a result the draft order was accordingly perfected as reflected at pp 135–136 of the appeal record.

E Next, the defendant's solicitors on 15 September 1997, took upon themselves to serve on the plaintiff's solicitors the English language version of the particulars. On the same day, the plaintiff's solicitors wrote a letter to the defendant's solicitors notifying them that the particulars served on 15 September 1997 were null and void as the particulars were not filed within the prescribed time as ordered by the deputy registrar and confirmed F by the learned JC (see p 300 of the appeal record).

On 16 September 1997, the defendant's solicitors filed in court and served on the plaintiff's solicitors the Bahasa Malaysia version of the particulars (see pp 148–155 of the appeal record). It was purportedly made pursuant to the order of the learned JC of 14 August 1997.

G Quite naturally, the plaintiff through his solicitors' letter dated 16 September 1997 (p 304 of the appeal record) vehemently protested to the steps taken by the defendant in the tendering of the particulars. From the said letter, the plaintiff contended:

(a) there was no necessity for him to apply for a fresh application as H intimated by the defendant as the learned JC did not give any extension of time to the defendant to file the particulars; and

(b) the defendant failed to comply with the order of the deputy registrar duly affirmed by the learned JC.

In that event, the plaintiff maintained that the particulars were null and I void and the acceptance of the service of the particulars should not be treated as a waiver on his part.

On 20 September 1997, the plaintiff filed the summons-in-chambers (encl 69) to strike out the particulars.

On 8 October 1997, the defendant filed the summons-in-chambers (encl 73) for an extension of time to file the particulars.

On 17 October 1997, the learned JC dismissed encl 69 and allowed encl 73 (see [1998] 5 MLJ 530). The learned JC allowed the plaintiff his costs in respect of encls 69 and 73 though in his written judgment later he stated that on further reflection he ought to have ordered costs be in the cause. Hence the appeal by the plaintiff to this court.

Issues

(a) Whether the learned JC had the jurisdiction to allow the application of the defendant (encl 73) to extend the time to supply the particulars bearing in mind that he had affirmed the order of the deputy registrar on 14 August 1997.

(b) If he had the jurisdiction, whether the learned JC had correctly exercised his discretion.

We observed that the problem arose in this way:

(i) On 21 June 1997, the defendant filed an appeal to the judge in chambers against the whole of the decision of the deputy registrar given on 18 June 1997.

(ii) The defendant did not obtain a stay of the order of the deputy registrar.

(iii) On 7 July 1998, the appeal before the learned JC came up for hearing but was adjourned to 8 July 1997.

(iv) On 8 July 1997, the learned JC ordered:

  (a) the parties to put in written submissions; and

  (b) fixed the date for decision on 14 August 1997.

(v) On 14 August 1997, the learned JC gave an oral decision. His decision (pp 292–293 of the appeal record) was:

  Prayer (1) allowed except para 11 to be struck out.

  Prayer (2) allowed.

  Prayer (3) disallowed.

  Prayer (4) each party to pay its own costs.

  Fixed 20 August 1987 for case management.

From the sequence of events set out above, it is clear that by the time the learned JC gave his decision on 14 August 1997, affirming that part of the order of the deputy registrar in respect of the particulars (prayer 3), the time prescribed by the deputy registrar had lapsed. He knew or ought to have known of this fact. If he was minded to extend the time, he could certainly have done so. In any event even if the learned JC had overlooked this fact as to the time prescribed, it was a matter for the defendant to bring to his attention of such fact and if need be to apply orally to him to extend the time. It would then be a matter for him to exercise his discretion to extend time or refuse an extension.

There was a bit of confusion as to whether the defendant applied orally for extension of time at the appeal stage.

However, the learned JC at p 4 of his judgment (p 24 of the appeal record) stated:

> My recorded notes do not show that an application was made by the defendant to extend time and that I dismissed the same.

The learned JC, whilst agreeing that that part of the order of the deputy registrar ought to have been complied with or an application for stay filed by the defendant, then went on to say (at p 533G): 'any compliance of the order of the deputy registrar whilst the matter is under appeal, would have rendered nugatory the subsequent appeal'. We consider this statement to be incorrect.

First, an appeal does not automatically operate as a stay of the proceedings in which the appeal is brought and this is clear from O 56 r 1(4) of the Rules of the High Court 1980 except so far as the court may otherwise direct.

Second, in order that the appeal is not rendered nugatory, it is for the defendant to apply to the deputy registrar for an order of stay pending appeal to the judge in chambers. In the event of failure to obtain the stay order before the deputy registrar, it is then open to the defendant to apply to the judge in chambers for a stay order.

On both counts, the defendant failed to apply for a stay order.

The law is clear on the steps to be taken to prevent an appeal from being rendered nugatory.

In the circumstances, the learned JC, having regard to the facts before him, erred in stating that compliance with the deputy registrar's order would have rendered the subsequent appeal nugatory.

The learned JC went one step further by stating that if the plaintiff felt strongly on this issue, the plaintiff should, as soon as the 30-day period was over, that is, after 18 July 1997, apply to strike out the appeal. According to the learned JC, the plaintiff by appearing before him and arguing the matter, he had waived any right to file encl 69 and he was estopped by his own conduct.

It should be noted that the appeal was not confined to that part of the order by the deputy registrar on particulars only but also against the striking off of part of the amended defence and the amended counterclaim (see pp 117–147 of the appeal record).

Further, at the time when the appeal first came for hearing before the learned JC on 7 July 1997 and adjourned to 8 July 1997, the time imposed by the deputy registrar, that is, on or before 18 July 1997 had not lapsed yet. In that event, how could it be right or possible for the plaintiff to apply to strike out the appeal as intimated by the learned JC. At that point of time, the appeal was properly before the learned JC.

However, instead of hearing and arriving at a decision on 8 July 1997, the learned JC decided to adjourn the appeal again to 14 August 1997 and

ordered the parties to put in written submissions for him to give a decision on the said date. Quite naturally, it would be too late in the day and in any event beyond the plaintiff's control to file an application to strike out the appeal as intimated by the learned JC as 14 August 1997 had already been fixed for his decision.

Clearly, therefore, the learned JC was wrong and misdirected himself on this issue.

Waiver or estoppel on the part of the plaintiff

The order of the deputy registrar was in precise terms and that order was affirmed by the learned JC on 14 August 1997. The particulars had been served outside the time limit prescribed by the order and there has clearly been default by the defendant. The inescapable conclusion would be that those paragraphs as stipulated in para 3 of the order of the deputy registrar relating to the amended counterclaim of the defendant became automatically struck out (see *Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan* [1982] 2 MLJ 13).

The Federal Court in *Pertubohan Berita Nasional Malaysia v Stephen Kalong Ningkan* stated that there cannot be a waiver of the order of the court and at p 15 said:

> ... In this connection, it should be observed that the time limit for service was fixed by a court order, and *it seems hardly competent for the appellant to waive compliance with a court order: the proper means to excuse non-compliance is by way of a further court order.* This order the respondent sought — but not until months later, in August 1979. He could have made his application for such an order before the hearing of the appellant's summons-in-chambers, but he did not do so. When queried as to the delay, learned counsel for the respondent stated that it was a mistake for the respondent not to have applied for the extension earlier — a hardly convincing reply! (Emphasis added.)

On the estoppel issue, it should be noted that estoppel in the context of litigation arises only when a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 at p 583). In this case, the plaintiff took the initiative by encl 69 to strike out the particulars with the consequential result as per the order of the deputy registrar that the relevant paragraphs of the amended counterclaim be struck out.

In the circumstances, the learned JC was wrong to rely on the issue of waiver or estoppel in granting the defendant's application (encl 73).

Jurisdiction

It was the contention of counsel for the plaintiff that as the learned JC did not on 14 August 1997 extend the time for the defendant to file the

particulars and having affirmed the order of the deputy registrar, the matter has become res judicata and the court has no jurisdiction to consider the defendant's application (encl 73) for an extension of time. Counsel for the plaintiff cited the decision of this court in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 in support thereof. In that case, the judgment of Sharma J in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 was cited with approval and at p 66 of the report, the following was stated:

> We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

The order of the learned JC dated 14 August 1997 had been drawn up and perfected and following the contention of counsel for the plaintiff, the learned JC has no power to extend the time as per the defendant's application (encl 73). This he surmised would tantamount to altering, varying or setting aside (unless under the slip rule) of his earlier order (see *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143).

The defendant's only remedy, continued counsel for the plaintiff, was to appeal against the order of the learned JC given on 14 August 1997 when he did not grant the extension of time when affirming the order of the deputy registrar. The defendant did not appeal but instead chose to file an application (encl 73) for an extension of time.

We would agree with the submission of counsel for the plaintiff only if the defendant applied to set aside the order of the learned JC affirming the order of the deputy registrar as to particulars as well. What the defendant did in her application (encl 73) was merely to ask for an extension of time to file the particulars. In this respect, the Federal Court in *Pertubohan Berita Nasional Malaysia* in observing the time limit for service fixed by a court order (as in this case), stated at p 15:

> ... the proper means to excuse non-compliance is by way of further order.

We agreed with counsel for the defendant that the court has a discretion to extend time as provided by O 3 r 5(1) of the Rules of the High Court 1980. Under O 3 r 5(2), this power may be exercised even if the application is made after the expiry of the period.

Order 3 r 5 reads:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by the rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in para (1) although the application for extension is not made until after the expiration of that period.

In the circumstances, it would seem that the learned JC had the jurisdiction to extend by a further order the time prescribed by the deputy registrar in his order dated 18 June 1997.

Discretionary power to extend time

Ideally, all prescribed time limits falling under statute or made by court orders should be complied with and not to be ignored (see *Samuels v Linzi Dresses Ltd* [1981] 1 QB 115 at p 126).

In the exercise of his discretion to extend time, the learned JC had this to say at pp 533I–534A of his judgment:

> I therefore was of the opinion that because of the close relationship between the respective protagonists, every opportunity must be given to either party to ventilate fully their grievances; for where else can either party go for justice than the footsteps of this court.

There may well be grievances between the parties and that every opportunity must be given to ventilate their grievances especially in view of their close relationship but then was this a valid ground for the learned JC to exercise his judicial discretion? If the learned JC was right on this ground, it would invariably mean that in all such cases there will be automatic extension irrespective of the grounds for non-compliance however heinous the conduct may be. In that event, orders of court as to time would be rendered futile. It is for this reason that acrimonious disputes between the litigants would definitely call for extra caution and strict observance of all orders as to time.

In this respect, we can do no better than to quote the view of Ward LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at p 1875:

> The basis of the rule is that orders of the court must be observed and the court is entitled to expect its officers and counsel who appear before it to be more observant of that duty even than the litigant himself.

It would then be for the defendant to explain or give reasons for her disobedience to the order of the court before the court could exercise its discretion. Sir Nicolas Browne-Wilkin VC, in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 at p 637 of the report has also expressed his views:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to such extraneous circumstances, such failure to obey is not to be treated as contumelious and

A therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

In this case, the ground of ventilation of grievances can hardly be said to be due to extraneous circumstances.

The learned JC did not consider whether the failure to obey the order
B was intentional or contumelious and since the numerous authorities were of one mind that such conduct should be considered, in our view, the learned JC erred when he failed to consider the defendant's conduct in refusing to obey the order.

It is apparent from the appeal record that the disobedience of the
C order was grounded on the fact that the defendant, when confronted with the plaintiff's protest against service of the particulars on 15 September 1997, claimed that there was no need for her to comply with the order. She took the stand that the order of the deputy registrar and subsequently the order of the learned JC were a nullity and suggested that the plaintiff make a fresh application for the particulars instead (see p 302 of the appeal
D record). This is so as the plaintiff had since reamended his statement of claim and the defendant had also reamended her statement of defence and counterclaim. As the particulars ordered to be filed were in respect of the amended counterclaim and since that particular pleading has been reamended, the order for particulars had become redundant.

E This contention cannot be correct as the particulars ordered to be filed were in respect of the defendant's amended counterclaim filed on 19 April 1997. The amendments made by the plaintiff were restricted to his statement of claim. The defendant's counterclaim was wholly untouched and never amended.

F In any event, a party cannot ignore or refuse to comply with an order of court on the ground of nullity. The Federal Court in *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, had this to say on the matter at p 159 of the report:

> ... An order, even irregularly obtained, cannot be treated as a nullity, but
G must be implicitly obeyed, until by proper application it is discharged. This view is supported by authority. In dealing with the contention that the original order had been erroneously granted in *Fennings v Humphrey* (1841) 4 Beav 1; 49 ER 237, Lord Langdale MR said:
>
> '... He is not to determine for himself, but ought to come to the court for relief, if advised that the order is invalid.'

H That same sentiment was expressed by the (then) Supreme Court in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 where at p 102 of the report, it quoted with approval the following passage in the judgment of Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567:

> I It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent iurisdiction to obey it unless and until that order is discharged.

In the circumstances it would be wrong for the defendant to determine for herself that the order was a nullity and she need not comply with it.

The fallacy of the stand taken by her on the order of the court is shown by her taking the step of filing the application (encl 73) for an extension of time to comply with the very same order that she considers to be a nullity. This would surely reflect her intention to initially flout the peremptory order.

There is also the defendant's contention that she believes she was given an extension of time up to 15 September 1997 by the order of the learned JC dated 14 August 1997 to file and serve the particulars.

The notes of the proceedings, the judgment of the learned JC and the order that was drawn up and perfected could not support her belief. She then readily admitted that she was mistaken.

To put it in a nutshell, she intentionally and deliberately disobeyed that part of the order for the particulars to be served and filed within a prescribed time and after realizing the serious consequences of the plaintiff's application (encl 69), she had no choice but to file her application (encl 73) for an extension of time.

Counsel for the defendant submitted that the effect of the plaintiff's application (encl 69) would be prejudical to her as certain paras of her amended counterclaim would be automatically struck out. This is a non-issue as prejudice itself is not a ground for the learned JC to consider when exercising his discretion to extend time. This is so as we have shown from the many authorities cited that the primary consideration is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

Ventilation of the grievances as found by the learned JC can hardly be an acceptable ground for him to exercise his discretion in favour of the defendant for the reasons stated earlier. Neither had it been shown by the defendant on the factual situation that the failure to obey the order was due to extraneous circumstances.

In the circumstances, we consider that the learned JC erred in exercising his discretion as he failed to properly consider all the material facts before him and applied the wrong test.

Though an appellate court should be slow to interfere with the exercise of the discretionary power of the court below, for the reasons appearing in this judgment, there are compelling grounds for us to so interfere (see *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 and *Public Bank Bhd v Nikseng Development Sdn Bhd* [1997] 3 MLJ 101).

For the reasons that we have given, we had allowed this appeal with costs, set aside the order of the High Court and ordered the deposit to be refunded to the plaintiff.

Appeal allowed with costs.

Reported by Jafisah Jaafar